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No. 772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

TELEPHONE NEWS SYSTEM, INC.,
an Illinois corporation,

Plaintiff-Appellant,

vs.

ILLINOIS BELL TELEPHONE COMPANY,
an Illinois corporation,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY OF TELEPHONE NEWS SYSTEM, INC., TO MEMORANDUM FOR THE UNITED STATES

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The Memorandum for the United States only serves to underscore the fact that the questions presented by this appeal are substantial.

Illustrative of what we say is the fact that the government did not file a motion to affirm within the time prescribed by Rule 16 of this Court. When the motion finally was filed, two weeks late, the Memorandum contained

the candid admission that the government had originally decided not to move to affirm because the statute involved is a new one and a matter of first impression (Gov't's. Memo., p. 4). The government explains the reversal of its initial decision by saying that after further study it was persuaded this appeal does not present a substantial question requiring plenary review by this Court (Govt's. Memo., p. 4). We believe a brief examination of that statement is warranted.

As the government concedes, the statute in question is new, having been enacted in the fall of 1961 (App. 13A). It was a law sponsored by the Justice Department and shepherded by its reprsentatives through the Congress (Appellant's Exs. E, F, G, H). The Attorney General of the United States, Robert F. Kennedy, and Mr. Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division, testified in support of the bill (App. 71A, 72A; Appellant's Exs. E, F, G, H). Since its enactment into law, the government has brought a substantial number of proceedings under the statute.[1]

In light of these circumstances and against this background, the original decision of the government not to file a motion to affirm could not have been other than carefully thought out; it was patently not casually reached. Obviously, the question must have been resolved with due regard to the Justice Department's well-defined interest in this law. Therefore, at least during the thirty day period afforded by Rule 16 to file a motion to affirm, the government was in agreement with us concerning the substantial

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[1] *Kelly* v. *Illinois Bell Telephone Company*, 325 F. 2d 148; *United States* v. *Bergland*, 209 F. Supp. 547, reversed, *United States* v. *Bergland*, 318 F. 2d 159; *Marcus* v. *United States*, 310 F. 2d 143; *United States* v. *Synodinos*, 218 F. Supp. 479; *United States* v. *Smith*, 209 F. Supp. 907; *United States* v. *Yaquinta*, 204 F. Supp. 276.

nature of the questions presented by this appeal. The fact that it elected to change its position after the time for filing the motion expired is not an impelling reason for concluding that its decision in the first instance was erroneous.

Additionally, there is the government's apparent unwillingness to meet our contention that appellant has been found guilty of violating a statute not in existence at the time of the claimed violation, and that appellant was thus exposed to the operation of an *ex post facto* law. Also, there is an avoidance of any real argument on the constitutional issue, seemingly on the professed ground that appellant is obviously guilty of violating the Illinois statute and, therefore, somewhat less entitled to the constitutional safeguards than one whose guilt has been less positively established.

On the basis of the foregoing, it is felt that it would be more convenient for the Court were we to reply first to the government's answer to our argument that there was no evidence to sustain the finding of the single judge and three-judge court that appellant had violated Section 28-1 (a)(10) of the Illinois Criminal Code.

On pages 5 and 6 of its Memorandum, the government states the issue as follows:

> "b. Appellant makes two other contentions: (1) That evidence that a particular gambler used appellant's facilities in a period before October 1961 was inadmissible because the use occurred prior to the effective date of Section 28-1(a) (10) of the Illinois Code, the State statute found by the court to have been violated by appellant's activities: . . ."

It answers in this way (Govt's. Memo., p. 6):

> "The testimony that the information was used by a gambler merely demonstrated the obvious—that the

> service was one designed to aid illicit wagering. Applied to the facts of this case, the prohibition against the use of telephone facilities to transmit wagering information neither violates the First Amendment nor discriminates against appellant's business since the telephones were used only to transmit wagering information."

Manifestly, this only begs the question as to whether the described evidence was admissible or not. And the manner in which the government attempts to shrug off this issue is fairly suggestive of the fact that there is really no way to justify the finding of the courts below that appellant was guilty of violating a criminal statute, when the operational facts giving rise to the alleged violation occurred several months prior to the effective date of the law.

The vice of the government's argument is obvious. The identity of the person using the information transmitted by the appellant is immaterial. The issue is whether the Illinois Criminal Code could operate retroactively against appellant on the basis of transactions occurring three months prior to the effective date of the statute. The only question presented, and the one left unanswered, is: Was there any evidence introduced to prove that appellant's facilities were used by *anyone* subsequent to January 1, 1962, the date the Illinois Criminal Code became effective? The answer is no. Without such evidence, the record is completely devoid of *any* proof to support the finding that appellant was in violation of the Illinois statute.

And this proof is not supplied by quoting out of context the observation of Judge Will that, "[T]here is nothing in the record of this case indicating any lawful use of plaintiff's facilities." Nor is any such proof required.

Appellant was on trial for a criminal offense. No defendant charged with a crime is required to prove his innocence. Both courts below took pains to point out that, (a) although appellant was nominally the plaintiff in a civil proceeding wherein it sought a temporary injunction, the burden of proof lay with the government to show by a preponderance of the evidence that appellant was guilty of a law violation (App. 8A, 23A, 65A), (b) that despite the action being labeled a civil proceeding, it was quasi-criminal in nature (App. 65A), and (c) appellant was not required to come forward with evidence, much less testimony, until the government had satisfied its burden that appellant's service was being supplied in violation of law (App. 23A).

Nor is the government's characterization of appellant's business as "illegal" and as a "service designed to aid illicit wagering" an adequate substitute for relevant, competent proof that appellant was, in fact, engaged in an illegal or illicit enterprise or had violated some law. There is no such proof in this case, and to uphold the finding of the lower courts in that regard would be in direct conflict with this Court's decision in *Burgess* v. *Salmon*, 97 US 381, cited and discussed originally at pages 19 and 20 of our Jurisdictional Statement.

The facts and the law applicable to this facet of the case are simple and uncomplicated. To labor the subject further would, we feel, only demonstate that we have a distressing grip on the obvious.

In answering our argument directed to the constitutionality of Section 1084(d), the government says, as the majority of the three-judge court did, that 1084(d) is regu-

latory only, not penal, that subsection (d) does not require that the user of the facility be guilty of a wagering law violation and, therefore, one charged with having violated a Federal, State, or local law relating to the transmission or receiving of gambling information in interstate commerce is not entitled to the constitutional guaranties afforded one accused of a crime.

Regardless of whether it is the government's conclusion that Section 1084(d) was designed as a prophylactic or regulatory measure (Gov'ts. Memo., p. 5), the inquiry must be directed to substance, not to form, *Trop* v. *Dulles*, 356 US 86, 95, 96. The *sine qua non* of the removal of appellant's telephone facilities under Section 1084(d) is the finding in a civil action that appellant has been guilty of violating a criminal statute. The government conducts the prosecution and admits that it is the real party in interest. The indictment consists of a letter from the Justice Department to a telephone company charging that appellant is in violation of Federal law; at the conclusion of the case the appellant is found guilty of violating a state law. All without the constitutional safeguards extended to everyone accused of a crime. Here, the quantum of proof is merely a preponderance of the evidence, and the result is the demise of the appellant.

The semantics of the regulatory versus punitive character of this law contained in the majority opinion of the three-judge court and restated here by the government should not be the basis for a determination that the constitutional question is unsubstantial and that this Court should, therefore, decline to note its probable jurisdiction.

Again, we advert to Judge Will's concurring opinion in which he sums up most persuasively what we have here tried to say (App. 50a):

> "In this connection, it should be noted that the recent Supreme Court decision of *Kennedy* v. *Mendoza-*

Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963), discussed in Judge Hoffman's opinion, held invalid as punitive a section of the Immigration and Nationality Act of 1952 which automatically divested an American of his citizenship without the necessity of any prior criminal trial if he left or stayed outside the country to avoid the draft. The Court concluded that forfeiture of citizenship was clearly punishment. It seems to me that where the forfeiture of property will be fatal to the business life of the party involved and substantially greater and more severe than the maximum punishment which could have been imposed in a direct criminal proceeding, labelling it preventive and non-penal is a sophistry which hardly warrants the abrogation of the Constitutional protections which are the keystones of American criminal justice."

CONCLUSION

We respectfully submit that the government's Memorandum does nothing to detract from the arguments advanced in our Jurisdictional Statement. We believe the Memorandum simply serves to demonstrate that the questions presented are substantial and that this Court should, therefore, note its probable jurisdiction.

Respectfully submitted,

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